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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

EZRA ROYCE, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

REPLY BRIEF FOR PETITIONER

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We respectfully submit that the Commissioner's brief in opposition has not obviated the need for certiorari if the courts below are to be guided by intelligible rules of law. To indulge in such obscurities as "the true intent of the parties" (Resp. 12) is merely to resort to "anodynes for the pains of reasoning." Cf. *Commissioner* v. *Sansome*, 60 F. 2d 931, 933 (2d Cir. 1932), *cert. denied*, 287 U. S. 667 (1932). The obscurities do not become less elusive when the Commissioner pretty much concedes that Dora performed services for the Portland partnership, that the petitioner did not render any services to the Sea the partnership, and that

Dora acquired capital interests in both by valid gifts. (Resp. 11-12.) Indeed, the additional arguments which the Commissioner makes fortify our view that certiorari should be granted. For present purposes it seems enough to comment on only two aspects of these arguments.

In an effort to justify the decision below, the Commissioner summarizes the Tax Court's findings (Resp. 3-7), and then blandly proceeds to say that the Court of Appeals approved those findings. (Resp. 7-8.) In other words, he discreetly disregards the fact that the Court of Appeals rejected the Tax Court's findings on Dora's services. (Pet. 10.) As the Commissioner tries to put it, by way of a mere footnote, "These services, upon which taxpayer places great importance, consisted of checking cabs and drivers, and were of such a nature that they could be performed while shopping downtown or driving along the street. The Tax Court termed them 'relatively inconsequential'." (Resp. 12, n. 4.)

Obviously, what the Commissioner is attempting to do is to rationalize the decision below on the basis of findings which the Court of Appeals refused to accept. We need hardly add that the decision below must stand or fall on the facts as the Court of Appeals understood them, not on the facts as the Commissioner would like them to be. The Court of Appeals made its own specific findings on Dora's services, and these findings amply emphasize that Dora "regularly acted for the partnership as a checker." (Pet. 10-11.) And even the Tax Court agreed that her services were similar to those normally performed by a regular employee. (Pet. 10.)

2. The Commissioner contends that a wife cannot qualify as a partner unless she joins the firm for some "business purpose." (Resp. 10.)[1] However, it is well settled that an individual may become a partner through the acquisition of a capital interest or a contribution of services, regardless of whether his becoming a partner serves a "business purpose." See *Hanslee* v. *Whitson*, 200 F. 2d 538, 540 (6th Cir. 1952); *Maloney* v. *Tunnell*, 218 F. 2d 705, 707 (3d Cir. 1955); *Whayne* v. *Glenn*, 222 F. 2d 549, 551 (6th Cir. 1955). We are only saying what the Commissioner himself has said. In the Commissioner's very own words, "an individual is entitled fully to dispose of his or her property so far as the income tax law is concerned, and may give or sell interests in a business to members of his family. The question with which the law concerns itself is whether the individual has really done so. There is no requirement that intra-family gifts be motivated by a business purpose, which frequently they would not have, before the donee may be recognized as the owner, for income tax purposes, of the property given to him, and the same is true of other antecedent family transactions." Mim. 6767, 1952-1 Cum. Bull. 111, 117.

Unfortunately, the present case is still another example of what too often occurs in taxation. The Commissioner says one thing for purposes of administration, and then says exactly the opposite for purposes of litigation. Such convenient contradictions

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[1] The Commissioner insinuates that Dora was made a partner simply to reduce income taxes. (Resp. 10.) There is no such suggestion in either opinion below, nor is there an iota of evidence to this effect.

sufficiently indicate that the Commissioner is in need of further guidance by this Court.

Respectfully submitted,

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